RECORD OF DECISION
Final Integrated Planning Report/Environmental Impact Statement
for Devils Lake, North Dakota

I have reviewed the Final Integrated Planning Report and Environmental Impact Statement (IPR/EIS) for Devils Lake, North Dakota, dated April 2003, addressing the potential effects resulting from the construction and operation of various alternatives for flood damage reduction due to the rising levels of Devils Lake. Based on the review and after considering the views of other agencies and the public, I find the preferred plan to be technically sound and in the public interest. I also find that, contingent on the issuance of the Clean Water Act (CWA) Section 401 water quality certification and the CWA Section 402 permit by the State of North Dakota, the preferred plan is in accordance with environmental statutes. The preferred plan is the Pelican Lake 300 cubic feet per second (cfs) outlet plan, which consists of an outlet from Pelican Lake to the Sheyenne River. The preferred plan for Devils Lake consists of the following features:

- A 300 cfs pump station located just north of Minnewaukan, North Dakota;
- An open channel from Pelican Lake to the pump station and a buried pipeline from the pump station to the Sheyenne River, with a total length of about 22 miles;
- A regulation reservoir to regulate flows to the Sheyenne River;
- A provision to close Channel A during outlet operation and divert a portion of the flows from Dry Lake to the intake area of the outlet in Pelican Lake; and
- A provision to limit operation of the outlet to periods when Devils Lake stages exceed elevation 1443.0.

Alternatives to the Pelican Lake 300 cfs outlet project that were considered included no action, various outlet plans with different capacities and alignments, upper basin storage, and infrastructure protection. These alternatives are fully described in the Final IPR/EIS and are incorporated herein by reference.

All practicable means of avoiding or minimizing adverse environmental effects were included in plan formulation and have been incorporated into the preferred plan. Mitigation for potential project adverse effects include: acquisition and management of approximately 6,000 acres of riparian habitat; construction of approximately nine high flow by-pass channels for aquatic mitigation; compensation of increased treatment costs for municipal and industrial water users; acquisition of easements for induced damages due to flooding and increased groundwater elevations; and monitoring and compensation for effects on soil salinity. Measures to avoid or minimize potential project adverse effects include: installation of a sand filter to minimize, to the maximum extent practicable, transfer of biota from Devils Lake; establishment of a 300 mg/l sulfate constraint for water quality and 600 cfs channel capacity constraint at the point of insertion on the Sheyenne River to minimize impacts on the Sheyenne River and Red River related to water quality and flooding to the maximum extent practicable; use of best management practices to minimize water quality impacts and erosion during construction; adjustment of pipeline alignment during construction to avoid construction in wetlands to maximum extent

practicable; installation of a buried pipeline to avoid potential induced drainage effects to wetlands adjacent to the alignment and to minimize adverse effects where the alignment intersects wetlands; restoration of wetland areas along the open channel north of the town of Minnewaukan to pre-project conditions after the outlet ceases operation to maintain the original hydrology in important wetland areas; drawing water from Pelican Lake to minimize potential adverse effects to the maximum extent practicable; provision of erosion protection to approximately 23 critical sites and acquisition of approximately 133 acres immediately downstream of the insertion point on the Sheyenne River to reduce effects of induced sedimentation on aquatic habitat due to erosion; provisions of erosion protection to approximately 53 known cultural sites along the Sheyenne River to avoid loss of sites through accelerated erosion; ramping of flows at the beginning and end of operations to minimize flow effects on aquatic resources on the Sheyenne River; and extensive monitoring and rapid response protocol for biota of concern. Long-term monitoring and adaptive management are proposed to determine the effectiveness of the mitigation measures and the need for additional measures. Long-term monitoring is proposed for groundwater, water quality, vegetation, aquatic, terrestrial, and cultural resources, water users, erosion/sedimentation, and invasive species. If it is determined that the Sheyenne River ecosystem needs restoration following the operation of an outlet, additional authorization and funding would be required and will be requested.

The Environmental Protection Agency (EPA) has objected to the position characterized in the Final EIS regarding how the Section 404(b)(1) Guidelines apply to consideration of secondary effects (i.e., effects of project operation). The EPA insists that the proper interpretation of the Section 404(b)(1) Guidelines is that the U. S. Army Corps of Engineers' Section 404(b)(1) evaluation for the outlet must address operational effects of the proposed project (i.e., secondary impacts) as an integral part of the factual determinations made under 40 CFR 230.11 and compliance determination made under 40 CFR 230.12. The Corps of Engineers recognizes that the EPA is the Federal agency primarily responsible for the writing and interpretation of the Section 404(b)(1) Guidelines. As such, the strongly-held views and interpretations of the EPA regarding the meaning of the Section 404(b)(1) Guidelines deserve deference from other Federal agencies, including the Corps of Engineers.

Consistent with the foregoing discussion, the Corps of Engineers concludes that the Guidelines may be interpreted to allow the Corps of Engineers, in considering secondary effects to make its determination of Section 404(b)(1) compliance contingent upon issuance of the associated Section 401 water quality certification and Section 402 permit for the outlet. In addition, the Corps of Engineers notes that the preferred plan contains mitigation features to offset potential adverse effects of outlet operations, as well as an operational monitoring plan. Monitoring results will be used to reassess operational effects and the mitigation plan will be reevaluated using adaptive management procedures. The Corps of Engineers expects that future environmental operational issues for the outlet will be addressed by the Clean Water Act (CWA) Section 401 water quality certification and the CWA Section 402 permit that the State of North Dakota has been requested to grant for the construction and operation of the outlet. Just as future construction and operation of

the outlet are contingent upon North Dakota's granting of the Section 401 water quality certification and Section 402 permit, so also should the Corps of Engineers' determination of compliance with the Section 404(b)(1) Guidelines be considered contingent upon North Dakota's granting of the Section 401 water quality certification and Section 402 permit. If and when those two state approvals are granted, full compliance with the Section 404(b)(1) Guidelines, and with the Clean Water Act in general, will be established (unless the State of Minnesota and the Environmental Protection Agency invoke the CWA provisions relating to inter-state disputes, e.g. CWA Section 401(a)(2)). As noted in Final EIS, page Appendix 1-10, the Corps of Engineers' evaluation of operational effects of the outlet leads to the conclusion that both construction and operation of the outlet comply with the Section 404(b)(1) Guidelines, as explained above.

By the Energy and Water Development Appropriations Act, Fiscal Year 2003, Division D of Public Law 108-7, Congress authorized and directed the Secretary of the Army, acting through the Chief of Engineers, to initiate construction of an emergency outlet from Devils Lake, North Dakota, to the Sheyenne River, subject to several requirements, including the Secretary of State's providing assurances that the outlet will not violate the Treaty between the United States and Great Britain Relating to the Boundary Waters Treaty of 1909, and reporting back to Congress that the construction is technically sound, environmentally acceptable, and in compliance with the National Environmental Policy Act of 1969. In accordance with the authorization for this project, future construction and operation of the outlet are subject to the Department of State's providing assurances that this project will not violate the Boundary Waters Treaty of 1909, and reporting back to Congress that the construction is technically sound and environmentally acceptable and in compliance with the National Environmental Policy Act of 1969. Actual construction of the project would also be dependent upon identification of a non-Federal sponsor willing to cost share in the project. Further, additional authorization to increase the estimated cost of the project would be required to complete implementation of the project.

The Draft EIS and Final EIS contain substantial discussions of potential cross-boundary effects in Canada. This discussion was included to further international cooperation regarding issues of concern to Canada and in support of the Corps of Engineers' congressionally-mandated analysis of the implications of the proposed action for the United States' obligations under the Boundary Waters Treaty of 1909. This discussion also fulfills any obligation under Executive Order 12114 and 42 U.S.C. § 4332(2)(F) with respect to the potential trans-boundary impacts of the proposed action.

Technical and economic criteria used in the formulation of alternative plans were those specified in the Water Resource Council's Principles and Guidelines. All applicable laws, executive orders, regulations and local government plans were considered in evaluating the alternatives. The environmentally preferred alternative would consist of continuing the infrastructure protection measures. I have not recommended the infrastructure protection measures alternative for the following reasons.

The preferred plan is the least environmentally damaging practicable outlet alternative. Given the uncertainty in forecasting future lake levels and the experience of the last ten years, I find that the risk of additional damages, both adjacent to and downstream from the lake, if the lake continues to rise, is unacceptable. Therefore, the potential flood damage reduction benefits gained by construction of the preferred outlet project will best serve the public interest in the event the lake continues to rise; those benefits outweigh any adverse environmental effects of building and operating the preferred outlet. Postponing implementation of an outlet until an overflow is imminent is not recommended, since an outlet could not be constructed quickly enough, nor would it pump fast enough, to prevent an overflow. The preferred plan would generally result in lake stages about 3 feet lower than expected under the wet future condition. The continued rise of the lake would adversely affect the viability of the regional economy and the general well being of the Devils Lake area. The preferred plan would reduce the risk of flooding to approximately 50,000 acres of land, homes, and other infrastructure features around the lake, resulting in significant saving in potential infrastructure protection measures. The preferred plan would also significantly reduce the potential for drastic impacts to downstream water quality and the risk of biota transfer associated with a natural overflow. In addition, implementation of the Dry Lake diversion feature would be subject to determination from the U. S. Fish and Wildlife Service (USFWS) that the feature is compatible with management objectives of the Lake Alice National Wildlife Refuge and other USFWS managed lands, as defined by the Refuge Improvement Act of 1997. Finally, upper basin storage has the ability to reduce the rise of Devils Lake and associated damages and provides natural resource benefits. Therefore, further study of upper basin storage is warranted and may also be a desirable feature to implement. The Record of Decision completes the National Environmental Policy Act process.

Robert B. Flowers
Lieutenant General, U.S. Army
Commanding

14 Oct 03
DATE